United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1569

To be argued by
Lawrence Hochheiser

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA,

Appellant,

- against -

HERMAN BANERMAN, VINCENT F. CIOFFI, KENNETH R. LEMANSKI, FRANK P. MENGRONE and JOSEPH SCHNITZER,

Appellees.

On Appeal from the United States District Court For the Eastern District of New York

Docket No. 76-1569

- X

BRIEF FOR APPELLEE LEMANSKI

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BRIEF FOR APPELLEE LEMANSKI

Issue Presented

This is an appeal by the United States, pursuant to Title 18 U.S.C. §3731, from an order of the United States District Court for the Eastern District of New York (George C. Pratt J.) suppressing evidence against appellees Herman Banerman, Vincent F. Cioffi, Kenneth R. Lemanski, Frank P. Mengrone and Joseph Schnitzer.

The sole issue presented on appeal is whether appellees have established their standing to contest the warrantless search, on September 2, 1975, by agents of the Federal Bureau of Investigation of the garage in the building at 226 39th Street in Brooklyn, New York.

PRELIMINARY STATEMENT

Appellees, together with their co-defendants, Montevecchi and Schneider, were charged in a two count indictment in the United States District Court, Eastern District of New York, with unlawful possession on September 2, 1975 of a quantity of "Stanley" brand hand tools recently stolen from interstate shipment, and with conspiracy to possess the stolen tools.

On September 29, 1976, after an extensive four day hearing, the United States District Court granted the defendants' motion to suppress all evidence in the case seized as the result of a warrantless search of the building at 226 39th Street, in Brooklyn, New York on September 2, 1975. (A 161).[1] The search was conducted by FBI agents and resulted in the arrest of the defendants and the seizure of the stolen tools and other items of evidence.

Thereafter, the United States moved to reopen the suppression hearing and also sought rehearing of the motion to suppress, on the ground that appellees Banerman, Cioffi, Lemanski, Mengrone and Schnitzer had not established their standing to contest the allegedly illegal entry into 226 39th Street. On November 22, 1976, the district court denied

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[1] References preceded by the letter "A" are to pages of Appellant's Appendix. All other references are to pages of the transcript of the suppression hearing held on September 23, 24, 27, 28 and 29, 1976.

the Government's motion in all respects. The United States subsequently appealed from that part of the November 22, 1976 order which denied rehearing with respect to the standing of Banerman, Cioffi, Lemanski, Mengrone and Schnitzer to contest the September 2nd search.

ARGUMENT

I. APPELLEE LEMANSKI HAS STANDING TO MOVE TO SUPPRESS EVIDENCE SEIZED AT THE GARAGE AT 226 39TH STREET

The Supreme Court summarized the three bases to establish standing in Brown v. United States, 411 U.S. 223, 229 (1973), where it held that there is no standing to contest a search and seizure where the defendants:

> (a) "were not on the premises at the time of the contested search and seizure;
>
> (b) alleged no proprietary or possessory interest in the premises; and
>
> (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure."

Under each of the above criteria, appellee Lemanski has standing to challenge the search and seizure by FBI agents of all evidence seized on September 2, 1975, at the garage of the No Name Transportation Company, located at 226 39th Street.

A. LEGITIMATE PRESENCE AT THE TIME OF THE CONTESTED SEARCH AND SEIZURE

The Supreme Court has held that 'anyone legitimately in premises where a search occurs may challenge its legality ... when its fruits are proposed to be used against him." Jones v. United States, 362 U.S. 257, 267 (1960).

At the conclusion of four days of testimony at the suppression hearing, the government conceded that all the defendants had standing to contest the validity of the search and seizure inside the searched premises at 226 39th Street in Brooklyn: "They, Mr. Montevecchi and Mr. Schneider, have a proprietary interest in the premises in view of their position with the No Name Transportation Company. And the other defendants [Banerman, Cioffi, Lemanski, Mengrone, and Schnitzer] were all clearly inside the premises at the time of the search and seizure. So clearly there was the expectation of privacy, and we do not contest their standing." (A 76-77)

On appeal, the government has now taken the diametrically opposite position, arguing that the appellees had no reasonable expectation of privacy from governmental intrusion when the FBI agents illegally searched the downstairs garage, as the defendants were in the upstairs office

of the same building at the time of the search.[2] The garage part of the building, the government contends, was separate and distinct from the upstairs office; the appellees' privacy "was not violated any more than the privacy of strangers walking on the street." (pp. 13-14 of Appellant's Brief).

The United States District Court, however, clearly rejected the argument of the government that the defendants in the upstairs office did not have standing to complain about the validity of the entry and seizure downstairs in the garage.[3] (A 271-272)

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[2] The United States also asserts that they are not precluded by their initial concession from arguing the question of standing as standing is a question of law and a concession on a question of law is not binding on the Court. (Footnote 5, p. 10 of Appellant's brief). However, a reading of the government's concession quickly reveals that the United States Attorney made a factual concession that the appellees were physically present in the searched premises at the time of the search and seizure.

[3] In a written order dated November 22, 1976, the District Court found that the "defendants had standing to contest such search and seizure pursuant to concession by the United States Attorney and based upon the facts adduced at such hearing." (A 274)

The factual determination by the District Court that the appellees had standing was fully supported by the testimony that was illicited at the suppression hearing.[4] To begin with, detailed descriptions of the searched commercial building and evidence of how it was used (21, 214-218, 221, 432-434, 445-446, 570-517, A 58, 59, 60) amply support a finding that the building was one intergrated unit through which people naturally move about at will. The upstairs office, where the transportation company's record and bookkeeping duties were performed, was connected directly by a stairway to the garage-work area, where packing and unpacking, inventorying of goods, and loading operations took place in an area closed to the public. (A 20) In short, the upstairs office and the downstairs garage were not two unrelated, separate and distinct areas for the purposes of standing. Appellee Lemanski was legitimately present "on the premises" at the time when the search occurred,within the meaning of the phrase. Simmons v. United States, 390 U.S. 377, 389-390 (1968).

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[4] Where the findings of the trial court do not clearly appear not to be supported by the evidence, the Appellate Court may not interfere. United States v. Fabric Garment Co. 262 F. 2d 631, 642 (2d Cir. 1958); United States v. Johnson, 327 U.S. 106, 111-112 (1946).

Secondly, the appellant argues for an artificial and narrow definition of "legitimate presence." To be sure, "the term is not intended to be limited to physical presence." Trager and Lobenfeld, "The Law of Standing Under the Fourth Amendment," 41 Brooklyn Law Rev. 421, 448 (1975).

The gravaman of standing to claim protection of the Fourth Amendment depends upon whether the defendant can show that the invaded place was an area where he was entitled to "a reasonable expectation of freedom from governmental intrusion." Mancusi v. DeForte, 392 U.S. 365, 368 (1968).

Lemanski had a reasonable expectation of privacy from government intrusion into the first floor garage on September 2, 1975 based upon the following factors:

(1) he was lawfully on the premises and had authorized access to the searched garage;[5]

(2) as is more fully discussed in Point I B, infra, pages 10-13, appellee Lemanski was a worker, employee, and agent of the No Name Transportation Company, and was employed at its leased premises at 226 39th Street; (445-446, 571, A 58, 59);

(3) he had driven, repaired, and worked on the company's trucks, including the trucks from which evidence was seized; (23-25, 31-32, 34, 224-230, 713, A 55);

(4) he had entered, exited, and worked in the searched garage, which was not open to the public; (31, 34, 39-40, 721-722, 734);

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[5] In the case before the bar, appellee's right to be on the premises is established by inference from the allegations in the indictment (A 11-12), statements in the affidavit of

(5) at the exact time of the law enforcement officers' entry into the garage and seizure of Stanley tools and other evidence, Lemanski was only a staircase away in the upstairs office. (571)

In brief, the appellee's expectation of privacy did not depend merely on the exact room in which he was situated, by chance, at the exact moment of the disputed search and seizure. Indeed, a defendant, to have standing, need not be on the premises when the search occurs if he has permission to use the premises and the search is directed at him, as it was in the case herein. Spinelli v. United States, 382 F. 2d 871 (8th Cir. 1967), reversed in other grounds, 393 U.S. 410 (1968).

Special Agent Thomas L. Armstrong (A 54-47), and the testimony developed at the hearing to suppress. Appellee had been seen driving the company's trucks and entering and leaving the building in the course of several hours prior to his arrest, often accompanied by the owners [Schneider and Montevecchi] of the No Name Transportation Company. In addition, the affidavit in support of the appellee's motion to suppress alleges that he was "lawfully in the premises located at 226 39th Street" (A 15-16); this allegation was never refuted by the government.

B. POSSESSORY INTEREST IN THE PREMISES SEARCHED.

It is now settled that an employee who is in control or occupancy of the premises of his employer or part thereof, though lacking possession in the sense in which the term is defined in the common law, has standing to question the constitutionality of a search of the premises in his control and of the seizure of objects therein to be used against him in a criminal prosecution. Jones v. United States, 362 U.S. 257, 265-268 (1960).

Lemanski, the record of the suppression hearing demonstrates, was an employee and agent for the No Name Transportation Company who occupied and worked in the searched premises at 226 39th Street, including the garage, and drove, repaired, and controlled the trucks parked in the garage, from which evidence was seized.[6] (224-230) As such, he had a possessory interest in the premises for the purposes of claiming Fourth Amendment guarantees; he can contest the illegal seizure of the Stanley tools from the trucks and the garage which will be used as evidence against him at trial.

On September 2, 1975, a weekday during business hours, at about 2:00 p.m., the FBI observed appellee Lemanski

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[6] An accused had standing to attack the legality of a search where the reasonable inference was that he as there as the owner's agent or as the joint venturer with the owner. Commonwealth v. Rossetti, 349 Mas. 626, 211 N.E. 2d 658 (Sup. Ct. Mass. 1965).

driving a green and silver straight truck with the letters "RVD" on it; the "RVD" truck got off the Brooklyn-Queens Expressway at the 39th Street exit, was left double parked near the garage door of 226 39th Street, and the driver, Lemanski, entered the building. (23-25) Shortly thereafter, Lemanski drove a maroon Mack tractor out from the garage and parked it in front of the "RVD" truck. Lemanski then re-entered the 226 39th Street building. (31)

Shortly after 3:00 p.m., Lemanski and Schneider, an owner of the No Name Transportation Company (719, 771, A 76), approached the "RVD" truck and worked together making repairs on it. (31-32) After completing their chore, the two men returned to the garage. (34)

At approximately 3:15 p.m., Lemanski and Montevecchi, another acknowledged proprietor of the No Name Transportation Company (A 30, 69, 76), reappeared on the street and continued to make further repairs on the "RVD" truck, which was still double parked outside near the garage. (34) Montevecchi entered the "RVD" truck and backed it into the garage (39), after which the maroon tractor was also moved into the building. (40) The garage door and pedestrian door were both then closed. (40)

Besides the above described surveillance of appellee Lemanski on the afternoon of the contested seizure, Arnold Schneider, who the government concedes had a proprietary interest in the searched premises as an officer of the

No Name Transportation Company (A 76), testified that he worked with Lemanski on the "RVD" truck, (713) and they entered the garage together thereafter. (721-722) Continuing on, Schneider declared that his job on the day in question was to supervise the work being performed in the garage (722, 734), which entailed moving cartons from one truck to the "RVD" truck. (734) It consumed about three hours from the time the "RVD" truck came into the premises to accomplish this task.[7] (734)

When the FBI agents entered the premises at 226 39th Street, they discovered on the floor and in the trucks parked in the garage, including the "RVD" truck, cartons of Stanley tools and other items of evidence. (224-230)

One has standing to object to a search of his office, as well as of his home. The Fourth Amendment not only shelters those who have title to the searched premises but also those with a possessory interest in the premises. Mancusi v. DeForte, supra, 392 U.S. 365, 367 - 369 (1968).

Mancusi v. DeForte, supra, is a case in point. A labor union officer was found by the Supreme Court to have Fourth Amendment standing to object to the admission in evidence against him at a state court criminal trial of union papers which, prior to his indictment, were seized by state

[7] At the time of his arrest, defendant Lemanski made a statement to the FBI in which he admitted being employed as a truckdriver and mechanic by Montevecchi, an owner of the No Name Transportation Company. In addition, he helped load Stanley tool products from one straight truck to another truck inside the No Name Garage shortly before his arrest.

officials, despite his protest, from an undesignated part of the union office shared by him with several other officials. The Court stated that it did not matter that DeForte shared the office with other union officers. "DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups. This expectation was inevitably defeated by the entrance of state officials, their conduct of a general search, and their removal of records which were in DeForte's custody." 392 U.S. at 369.[8]

Likewise, Lemanski, although he did not have exclusive control over the 226 39th Street building, could reasonably have expected that only his co-workers, supervisors, and employers and their guests would enter the trucking company premises, and that no goods or records would be touched by outsiders except with their permission. This expectation was violated by the warrantless general search and seizure of merchandise and records by the FBI.

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[8] See also Villano v. United States, 310 F. 2d 680 (10th Cir. 1962), where the defendant had standing to attack the search of the desk which he used at his place of employment although he did not claim ownership of either the desk or the notebooks found therein, which were used by several employees, including the defendant.

C. AUTOMATIC STANDING FOR POSSESSORY CRIMES

Under the automatic standing rule set forth by the Supreme Court in Jones v. United States, 362 U.S. 257, 263-264 (1960), where a defendant is charged with a possessory offense and the possession alleged in the indictment occurred at the same time as the contested search and seizure, the defendant can assert his Fourth Amendment rights. Brown v. United States, 411 U.S. 223, 229 (1973).

The appellees, together with co-defendants Montevecchi and Schneider, presently stand accused in a two count indictment with unlawful possession on September 2, 1975 of a quantity of stolen Stanley brand hand tools and with conspiracy to possess the stolen tools. The allegation in the indictment that the unlawful possession occurred on September 2, 1975, the same date as the seizure, allows Lemanski to raise a Fourth Amendment claim challenging the propriety of the seizure. (A 11-12)

In Brown v. United States, supra, 411 U.S. at 228-229, the Supreme Court stated that it was not reconsidering overruling Jones and eliminating the automatic standing doctrine. Only recently, this Court held that until the automatic standing rule was overruled by the Supreme Court, it would abide by the automatic standing rule in the case of possessory offenses under the principle of stare decisis. United States v. Galante, ___ F. 2d ___,

Slip. op. 959, 963-964 (2nd Cir., December 14, 1976). Furthermore, the United States has failed to advance any compelling reason for abandoning the automatic standing rule.

II. TO THE EXTENT APPLICABLE, APPELLEE LEMANSKI ADOPTS THE POINTS RAISED BY HIS CO-APPELLEES

CONCLUSION

THE ORDER OF THE DISTRICT COURT, INCLUDING THAT PART WHICH DENIED REHEARING OF THE MOTION TO SUPPRESS ON THE QUESTION OF STANDING, SHOULD BE AFFIRMED.

Dated: Brooklyn, New York
February 11, 1977

Respectfully submitted,

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